

PROPOSED LOCAL RULE 16.2

Dated: Jan. 1, 2008

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative Dispute Resolution (“ADR”) is a vehicle for encouraging earlier, less costly resolutions of disputes than are otherwise attainable by trial. As contemplated herein, ADR may include progressive interventions at various stages of civil cases. Unless otherwise agreed upon by the parties, MEDIATION will be the primary ADR intervention. Other available interventions may include Neutral Evaluation, Mini-Summary Trial (advisory), Arbitration (binding and non-binding), Case Valuation and Settlement Week. The available interventions and processes are referenced in the “Plan for Alternative Dispute Resolution in the United States District Court for the Western District of New York” (“ADR Plan”), which is incorporated herein.

MEDIATION and any of the other processes available can be stipulated to or ordered by the Court at any time. All will require direct participation by parties and/or their representatives with knowledge of the facts and with decision-making authority.

16.2-1 MEDIATION

a. Definition. Mediation is a process in which an impartial person, the mediator, assists with communication between disputing parties to promote understanding, reconciliation and settlement. The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential area of agreement. The mediator does not serve as a judge or arbitrator, and has no authority to render a decision on any disputed matter or force a settlement. The parties are ultimately responsible for negotiating any resolution to their dispute.

b. Actions Subject to Mediation.

(1) All civil cases filed on and after [TBA], will be referred automatically for ADR. The purpose of ADR and the appropriateness of mediation shall be discussed at the pretrial discovery conference held pursuant to Local Rule of Civil Procedure 16.1. The Court’s scheduling order shall refer the case to mediation unless another form of ADR is agreed to by all parties. The following categories of cases are exempted from automatic referral:

- (A) *Habeas corpus* and extraordinary writs;
- (B) Actions to vacate a sentence;
- (C) Social Security appeals;
- (D) Bankruptcy appeals;
- (E) Cases implicating issues of public policy, exclusively or predominantly;
- (F) IRS summons enforcement actions;
- (G) Government foreclosure actions;
- (H) Civil asset forfeiture cases; and
- (I) Prisoner civil rights actions.

(2) The Court may refer any civil action pending as of January 1, 2006, or any portion thereof, to mediation by referral order or upon the stipulation of all parties.

c. Relief from Mediation. Any party who believes there is good cause why the action should not be referred to mediation must make a motion to the assigned judge within ten (10) days after the date of the Local Rule 16.1 conference or the ADR referral order, whichever is applicable.

d. Panel of Mediators. The Court shall maintain a panel of trained mediators in such numbers as it deems appropriate. Panel membership is a privilege, not a right, and the Court may withdraw the name of any mediator at any time. Upon acceptance to the panel, mediators shall take the oath prescribed by 28 U.S.C. § 453. The Court Clerk shall provide the Court's list of mediators to counsel, parties and the public, upon request.

e. Immunities. Mediators shall be immune from claims arising from acts or omissions incident to service as a court appointee in the mediation. See, e.g., Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

f. Compensation of Mediators. Mediators shall be compensated directly by the parties, according to the Court's fee plan. The mediator's fees and expenses shall be divided equally between all separately represented parties, unless otherwise agreed or ordered. The Court has discretion to assign *pro bono*/modest means cases to its mediators on an equitable basis.

g. Disqualification or Unavailability of Mediator. A mediator may be disqualified for bias or prejudice, pursuant to 28 U.S.C. § 144. A mediator shall disqualify himself or herself in any case in which a justice, judge or magistrate judge would be disqualified pursuant to 28 U.S.C. § 455, subject to the waiver provision of 28 U.S.C. § 455(e). A mediator who is unable to serve within the time period set forth in the Court's scheduling or referral order shall notify all counsel, unrepresented parties and the Court. A new mediator will be selected by agreement of the parties or, if the parties cannot agree, by the Court.

h. Procedure for Selecting a Mediator. Once the parties have stipulated or been referred to mediation, they shall have thirty (30) days from the date of the Local Rule 16.1 conference in new cases, or the ADR referral order in pending cases, to select a mediator, confirm the mediator's availability and file a stipulation regarding their selection. If a selection is not made in a timely manner or the parties cannot agree upon a mediator, one will be selected by the Court.

i. Scheduling the Mediation Session. Mediation sessions shall be held in the U.S. Courthouse or the mediator's office, unless otherwise agreed. Generally, the first mediation session will be scheduled within seventy-five (75) days after the Local Rule 16.1

conference. There shall be no continuation of mediation beyond the deadline established by the Court's scheduling or referral order, except upon good cause shown. Any settlement reached outside a scheduled mediation session shall be reported promptly to the mediator and the Court.

j. Mediation Memorandum. At least ten (10) days before the first scheduled mediation session, each party shall submit a "Mediation Memorandum" to the mediator. The memorandum shall not exceed 10 double-spaced pages. It shall not be filed in the case or otherwise made a part of the Court's file. The memorandum shall include:

- (1) The identity and title of:
  - (A) all person(s) with factual knowledge and/or settlement authority who, in addition to counsel, will attend the mediation, and
  - (B) any person(s) whose presence might substantially improve the effectiveness of the mediation or prospects for settlement;
- (2) A concise summary of the parties' claims and defenses;
- (3) The relief sought and the basis for monetary calculations;
- (4) The status of the case, including the status of any motions made;
- (5) A summary of any prior settlement negotiations, including offers and counteroffers; and
- (6) Any other information that might be pertinent to resolution of the case.

k. Attendance at the Mediation Session. Trial counsel for each party shall attend the mediation session and shall be accompanied by the individual or individuals with authority to settle the lawsuit and knowledge of the facts of the case. The latter shall be the parties (if natural persons) or representatives of parties that are not natural persons. Counsel cannot act as a party's representative, except for in-house counsel. Insurer representatives are required to attend if their agreement is necessary to achieve a settlement. Any request to be excused from in-person attendance must be submitted in writing to the mediator, with copies to all other parties, no less than ten (10) days before the mediation session.

l. Good Faith Participation. Parties and counsel shall participate in good faith, without time constraints, and put forth their best efforts toward settlement.

m. Default. Sanctions may be imposed by the Court on any party who, absent good cause shown, fails to attend mediation and to participate in good faith.

n. Confidentiality. Mediation is confidential and private. No participant may communicate any confidential information acquired during mediation without the consent of the disclosing party. There shall be no stenographic or electronic recording, e.g., audio or video, of the mediation process.

(1) All written and oral communications made in connection with or during the mediation session are privileged and confidential, including matters from parties, counsel and the mediator.

(2) There shall be no communication between the judge or magistrate judge and the mediator regarding a case referred for mediation.

(3) No communication made in connection with or during any mediation session may be disclosed or used for any purpose in any pending or future proceeding in this Court.

(4) The confidentiality of information disclosed during mediation does not prohibit or limit:

(A) the Court from collecting information relative to evaluation of the ADR program;

(B) the mediator from reporting a failure to participate in the mediation process in good faith, except that the mediator shall not disclose the content of confidential communications;

(C) the mediator from filing "Mediation Certification" forms in accordance with subpart (p) of this local rule;

(D) a party from seeking to enforce a settlement agreement;

(E) a party from disclosing the final resolution or settlement reached unless, in the interest of justice, the parties have agreed to the confidentiality of same; or

(F) a participant from making such disclosures as are required by law.

o. Conclusion of the Mediation. A mediation session shall be concluded by:

(1) Resolution and settlement of the dispute by the parties;

(2) Adjournment for future mediation by agreement of the parties and the mediator; or

(3) Declaration of impasse by the mediator that further efforts to resolve the dispute are unlikely to be productive.

Unless otherwise authorized by the Court, mediation sessions shall be concluded at least ten (10) days before the final pretrial conference scheduled by the Court.

p. Mediation Certification. Within ten (10) days after the close of each mediation session, the mediator shall file a Mediation Certification with the Court reporting the date the session was held, whether the case settled in whole or part and whether further mediation is scheduled. In the event the parties reached an agreement to settle the case, counsel for each party shall promptly prepare and file an appropriate stipulation of dismissal pursuant to Local Rule 41.1. If the parties agree to narrow, withdraw or settle some, but not all, of the claims, a stipulation concisely setting forth the resolved claims

shall be submitted within five (5) business days after the mediation session. The parties shall be bound by the stipulation. If mediation does not resolve all of the issues in the case, what remains of the case will proceed to dispositive motions and/or trial pursuant to the scheduling order.

#### 16.2-2 ARBITRATION

[existing Local Rule 16.2, renumbered]